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No. 83-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FRANK FOOLS CROW, *et al.*,
Petitioners,

v.

TONY GULLET, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CHRISTIC INSTITUTE, *ET AL.*

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Christic Institute herein respectfully moves, pursuant to Rules 36.1 and 42(3) of its Rules of Practice, for leave to file the attached brief as amicus curiae in order to support petitioner and to present its views, and the views of other amici, on the First Amendment questions presented here which concern the extent to which the constitution protects Indian religious freedom.

This motion and the attached brief are filed within the time allowed for filing of respondent's brief on the petition for certiorari.

Amici address the First Amendment standards which provide constitutional protection for Indian religious expression involving sacred land.

Amici believe that the courts below, while recognizing the central stature of Bear Butte in the religions of Petitioners, failed to adequately comprehend the burden on Petitioners' their religious practice and ritual of the State tourism development program on Bear Butte. Amici also believe that the court below erred by failing to adequately analyze the state's alleged interest in tourism to determine whether that interest is compelling, and whether any alternatives existed for advancing that interest that would be less restrictive of Petitioners' relgious freedom.

Amici are a consortium of Indian nations, Indian rights organizations, Churches and Temples of several denominations and civil liberties organizations and individuals, all of whom have either been involved in a prolonged struggle for religious freedom of the type represented in this lawsuit or who believe that encroachments on Indian religious freedom ultimately affect the religious freedom of all citizens of the United States. A clear, coherent and equitable application of the law is essential to achieve the goal of truly protecting religious freedom of all people. This case embodies that question in that it asks whether the constitution will be interpreted to protect religious expression that is quite distinct from those that are more typically Judeo-Christian in origin and perspective.

If this Court does not review the decisions below, the lower courts will continue to apply the law in such fashion that could make extinct traditional Indian religions. Such a possibility is certainly a fundamental reason for First Amendment protection.

Amici will clearly be affected by the outcome of this litigation, both as practitioners themselves or as persons who live in a society that is committed to the deepest form of pluralism--a pluralism that would be richer if it continues to include a religious tradition that requires a sophisticated balance between the spiritual and physical landscapes.

Amici have tried to obtain consent of both parties to participate in this case. The petitioner has granted such consent, but the Respondent is unwilling to do so. For the foregoing reasons, Amici respectfully move this Court for leave to file

the attached brief amicus curiae in support of granting the writ of certiorari.

Robert Hager
Washington, D.C.
Counsel for Amici

QUESTION PRESENTED

Is South Dakota's interest in developing as a tourist attraction one of the most important of Native American religious sites of a sufficiently compelling nature to justify the consequent burden this development places upon the First Amendment freedoms of those Sioux and Cheyenne who have worshipped there from time immemorial as a central and indispensable part of their religious faith and ritual.

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BRIEF AMICUS CURIAE OF THE CHRISTIC INSTITUTE, et al.

The organizations and individuals joined herein file this brief amicus curiae in support of the petition of Frank Fools Crow, et al. pursuant to Rule 36.1 of the Rules of the Supreme Court.

THE INTEREST OF AMICI

Americans for Indian Opportunity

Americans for Indian Opportunity is an Indian controlled organization that regularly works to seek protection for economic, human, political and religious rights of Indian people. The AIO joins this amicus curiae brief as a regular part of its work to contribute to the rebuilding of Indian nations.

Central Conference of American Rabbis

The Central Conference of American Rabbis is the professional rabbinic association of Reform Rabbis throughout the United States, Canada and Abroad. Founded in 1889, the Central Conference now numbers some 1400 rabbis serving about 700 congregations. The Central Conference has enacted a resolution in support of Indian Treaty rights and in that context intervenes as amicus curiae in this matter

of religious freedom which is of deep significance to all Native and Indigenous people.

The Christic Institute

The Christic Institute is a public interest law firm and policy center established in 1980 to bring spiritual and religious values to bear, in both traditional and contemporary ways, on public consciousness and policy making. The Institute is particularly sensitive to erosion of the constitutional guarantee of the free exercise of religion.

Reverend David Eaton, Senior Minister, All Souls Church Washington, D.C.

As an outspoken Church leader, Reverend David Eaton has promoted the rights of Black, Native American, Latino and Asian-Americans to enjoy the opportunity to express their religion and spirituality in their own terms. Reverend Eaton has long championed the rights of Native people and

in that context intervenes as amicus curiae in this lawsuit.

Gunaratana, Monk at Washington Buddhist Vihara Society and Buddhist Chaplain at American University

As a Buddhist Monk, I very strongly believe that religions of the people in the United States are protected by the First Amendment of the American Constitution. People came to this country from other countries primarily because of discriminations -- political, religious or otherwise -- of their home countries. We would appreciate if the same people who came seeking religious freedom would respect the religions that people practiced in North America before they arrived. We, as citizens of this country, have a responsibility to appear as amicus curiae when religious freedoms are violated.

International Indian Treaty Council

The International Indian Treaty Council represents traditional Indian governments from 98 nations in the Western Hemisphere as well as non-governmental Indian organizations and other groups fighting for Treaty rights, land rights and basic human rights. The Treaty Council supports this lawsuit as a component of its overall effort to represent Native and Indigenous people both domestically and within the United Nations on issues that concern Indian religious freedom.

Piscattaway Indian Nation

The Piscattaway Indian people are the Indigenous people of the state of Maryland and have been deeply involved in a prolonged struggle for religious freedom with the Department of the Interior. We vigorously support Indian religious freedom in all parts of the Western Hemisphere and the success at Bear Butte would also have

a favorable impact in our continuing struggle. May our Mother Earth endure her sufferings.

Plenty International/The Natural Rights Center

Plenty International is a not-for-profit organization with Non-Governmental Organization status in the United Nations. The purpose of the Natural Rights Center is to establish perspective about natural rights and the power to bring about peaceful transformation of human values and dignity. Plenty International/The Natural Rights Center have long struggled for human and economic rights of Native and Indigenous people and appears as amicus curiae in this case as part of its on-going work to support traditional Indian people in their efforts to freely express their spirituality.

Alan Sanborn, Director, Native American Concerns of the Episcopal Church

Alan Sanborn, Penobscot and officer of

Native American Concerns of the Episcopal Church has been involved in work with Native and Indigenous people in Alaska and the lower 48 states to protect and affirm cultural and religious tradition. Whether religious expression is allowed at Bear Butte will affect all Native people.

United Church Board for Homeland Ministries, United Church of Christ

The United Church Board for Homeland Ministries is the domestic mission arm of the United Church of Christ, and as such, bears major responsibility for Indian rights concerns. The United Church Board of Homeland Ministries is committed to participate in litigation on behalf of traditional Indian religious practitioners.

The decisions denying Petitioners First Amendment claims in the courts below permit significant state erosion of two of the Nation's Native religions. The courts

below misunderstood First Amendment protections of religious freedom and misapplied the appropriate constitutional tests which protect that freedom. The decisions threaten to spread a dangerous confusion over this area of the law. Amici stand with Petitioners in their defense of Native American religious freedom and offer here their brief in support of the grant of writ of certiorari requested by them.

SUMMARY OF ARGUMENT

This case involves the familiar First Amendment "balancing test" in a context never before addressed by the Supreme Court. Here the "balancing test" requires weighing the interests of the State of South Dakota in promoting tourism at an important, traditional Native American religious site, Bear Butte, against the rights of those Native Americans whose worship and ritual at the site are

rendered impossible and ineffectual by the intrusions and desecrations of tourists.

The principal defect in the decisions below is that they did not adequately weigh these competing interests, nor consider the availability of less restrictive alternatives. Because of this failure the rulings below are in direct conflict with the decision in Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) appeal filed July 22, 1983, No. 83-2225 (9th Cir.) where the appropriate weighing of interests was properly undertaken.

Bear Butte, designated by South Dakota as a state park, is central and indispensable to Petitioners' Lakota and Tsistsistas religions. The sacred vision quests held there provide the principal means by which both religions maintain their covenants with the Supreme Being.

The religious ceremonies held there require solitude and a pristine natural environment, but now seldom succeed because of Respondents' tourist development and construction projects.

The district court misapplied the two-part test for balancing the burden on Petitioners' religious freedom against the state's countervailing interests. The court incorrectly defined infringement of religious freedom at Bear Butte as the denial of physical access to ceremonial sites. So it found nothing wrong in Respondents' restrictions on Petitioners' religious conduct. The court weighed the burden upon Petitioners' religious freedom without considering that the conditions for Petitioners' ritual practices are ceremonially central and indispensable to their religious efficacy. Respondents were moreover spared the task of finding less restrictive alternatives to the

admitted burden on Petitioners' religious freedom.

The State promotes Petitioners' religions as a tourist attraction. By interpreting Respondents' construction activities and access restrictions as permissible assistance to Petitioners, the district court understood Petitioners to request further state aid in violation of the Establishment Clause. But the termination of this putative "assistance" and protection of the existing and historic religious nature of Bear Butte would involve Respondents neither in establishment of nor an excessive entanglement with Petitioners' religions.

ARGUMENT

I. BEAR BUTTE IS CENTRAL AND INDISPENSABLE TO PETITIONERS' RELIGIONS.

The importance of Bear Butte to the Lakota and Tsistsistas religions is well documented. See generally, D. Hedburg,

"Nowahus, Bear Butte, Sacred Mountain of the Cheyenne" (1976) (unpublished Master's thesis explaining various religious uses); P. Powell, People of the Sacred Mountain, A History of the Northern Cheyenne (1981). Both religions hold that Bear Butte is the center of the world and the indispensable altar for lonely communion with the Supreme Being. Affidavit of Laird Cometsevah, Jt. App. p. 23; Affidavit of Larry Red Shirt, Jt. App. pp. 36-37. The Tsistsistas prophets received the covenant at Bear Butte from the Creator who dwells within the sacred mountain; and according to the Lakota, the Great Spirit issues his commandments there.

The high deities of the Tsistsistas religion, the Creator and Mother Earth, join at Bear Butte to form the world's axis where the sacred Four Directions

meet. Sacred Mountain is the pillar that supports the firmament above and forms the highest point on earth. This mountain connects the spirits above the earth to those below. Eternal in time, the Butte stands as a monument to and remnant of the Creation. D. Hedburg, supra.

Bear Butte is known to the Tsistsistas as the "Learning Hill." In a cave deep within the mountain the prophets Sweet Medicine and Erect Horns were given the sacramental Medicine Arrows and Buffalo Hat by the high gods to guarantee the survival of the Tsistsistas Nation. The masculine sanctity of the Arrows and the feminine power of the Buffalo Hat are exhaustible and must be regenerated in the Sun Dance and Arrow Renewal. These two ceremonies, taught to the prophets at Bear Butte, reenact and renew the covenant. Participants take on the roles of the

prophets and the gods. Temples and altars, such as the Medicine Lodge and Arrow Lodge, replicate the sacred mountain, Nowahus -- Bear Butte -- the original and most holy structure. Tsistsistas homes and villages point to the mountain and each believer makes a pilgrimmage there at least once. See G. Grinnel, The Cheyenne Indians, Their History and Ways of Life (1923).

In the core religious experience of the vision quest, the mountain itself becomes an altar upon which the seeker stands alone. To experience a vision he must pray and fast in solitude at a questing place. P. Powell, Sweet Medicine (1969). The pledger purifies himself in a sweat lodge near the mountain with his instructor, family and other supporters. He then ascends to a place prepared for his quest where he will pass four days

exposed to the elements and spirits. He sets out tobacco and flag offerings at his prayer spot and may recline in a pit dug out for him. His supporters remain in meditation at the foot of the mountain. If the seeker is worthy, a spirit breaks his solitude, offering special power that can be summoned for protection and curing. The vision answers a personal spiritual crisis and allows the pledger to reenter social life with renewed purpose. J. Stands In Timber, Cheyenne Memories (1967).

Lakota religion is rooted in the Sacred Calf Pipe given the tribe by White Buffalo Calf Woman as a covenant with the Great Spirit, Wakan Tanka. The pipe is the central sacrament that binds the Seven Sacred Rituals by which the Lakota communicate with the Great Spirit. J. Brown, The Sacred Pipe (1953). The pipe is

offered to the Four Directions, Grandmother Earth and the eagle above. Through the pipe and its smoke the supplicant draws the universe to his personal center. The Great Spirit, a part of all things, responds to such prayers. The most serious supplications and offerings are made at the center of the world, upon Bear Butte. T. Mails, Fools Crow (1979).

The Lakota pipe fast has most of the elements of the Cheyenne vision quest, but the attainment of a vision may not be essential. The pledger may wish only to give thanks or pray for a favorable outcome in a crisis, such as the serious illness of a relative. The vision is the key element, however, in the process of religious training. A mystical experience or misfortune may lead to a recurring dream or perplexity requiring consultation with a spiritual advisor. The interpretation is confirmed or further elucidated by

the revelation of the vision quest. Direct communication with the Great Spirit may lead to apprenticeship with a holy person who can nurture this newly won relationship. With ordination, one's power is put to the service of others and must be renewed periodically on the mountain. W. Powers, Oglala Religion (1977).

Fools Crow has described the quest:

> To make the vision-questing place, I set four tall cherry tree branches in the ground to mark the corners of an eight foot long by six foot wide rectangle.
>
> When the pledger is within the enclosure he faces in whatever direction he is praying to. He will look up when he prays to Tunkasila and Wakan-Tanka, and he will look down when he prays to Grandmother Earth. If he stays there several days he will follow the sun and turn clockwise as he prays, whether he sits or stands. He can lie down at night and part of the time during the day, depending on how tired he is.

T. Mails, supra, at 121.

The purpose of the quest is to become

humbled before the Great Spirit in order to receive a blessing. Purity and emptiness are achieved through the sweat bath, the fast and lonely and quiet meditation. Bear Butte is a power place amongst power places and the place where Medicine Men must renew their connection to the Great Spirit, Tunkasila. A. Parlow, A Song from Sacred Mountain (Pine Ridge 1983).

The Locus of the Creation, Bear Butte has power only to the extent that it is preserved in its natural topography. Freedom from intrusive distraction is required to protect the delicate sacred communications there. Without Bear Butte, both religions' bonds to the Supreme Being would be broken.

II. PETITIONERS' FREE EXERCISE OF RELIGION HAS BEEN SUSTANTIALLY BURDENED.

The district court correctly stated the

two-part balancing test by which the state's conduct is to be measured:

> First, a court must decide whether the conduct, regulation, or law at issue burdens the free exercise of religion. Second, the restriction on the free exercise of religion must be balanced against the importance of the state's interest in the regulation or restriction. Id.

The recent proliferation of construction and tourist interference at Bear Butte has seriously reduced Petitioners' successful religious use of the mountain (Jt. App. pp. 20-22, 33, 42-43). Respondents have burdened the vision quests in several ways: (1) by constructing roads, parking lots, buildings and viewing platforms that in the Petitioners' religions are deemed to desecrate Bear Butte; (2) by promoting and facilitating the presence of tourists on Bear Butte, which tourists violate the solitude necessary to successful worship by crowding around vision

seekers, snapping photographs, taking sacred offerings, making noise and violating ritual standards of purity; (3) by preventing access through restrictive permit regulations and then restricting ceremonies at the alternate site at Bear Butte Lake; and (4) by requiring registration at the Visitor Center. Cf., Crow v. Gullet, 541 F. Supp. 785, 791 (D.S.D. 1982) aff'd on basis of Dist. Ct. opinion 706 F.2d 856 (8th Cir. 1983) (per curiam).

To establish the religious quality of the practices, a claimant must show that the pertinent beliefs are religious, that the burdened conduct is based on those beliefs and that the beliefs are sincerely held. Id. at 215-16. The district court concluded, "there is no dispute that plaintiffs' practices are based upon a

system of belief that is religious and sincerely held." 541 F. Supp. 785, 790. The test for religious quality requires also that the protected practices be serious, "rooted" in the faith, "inseparable and interdependent." Wisconsin v. Yoder, 406 U.S. at 215.

In cases involving Native American claims to free exercise of religion on government controlled sacred sites, lower courts have created a test, not supported by Yoder or other decisions of the Supreme Court, which conditions First Amendment protection of Native American religious practices upon the "centrality" of that practice to the particular religion. See e.g., Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980), cert. denied 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied,

452 U.S. 954, 101 S.Ct. 3099 (1981). Cf Hopi Indian Tribe v. Block, 8 I.L.R. 3073 (no. 81-0481, D.D.C. 1981), aff'd sub-nom Wilson v. Block, 708 F.2d 735 (D.C. Cir 1983) (rejecting centrality test in favor of "indispensable" test).

An infringement of free exercise occurs when conduct is compelled which violates religious dictates, or conduct is prohibited which is religiously mandated. Yoder, supra. In this case, the state's activities preclude Petitioners' exercise of their religion in accordance with their beliefs by denying the ritual integrity and religious efficacy of the practices that are central to Petitioners' religions. Respondents stipulated that the sacred mountain is "important and indispensible" (Jt. App. pp. 94, 163). The court took notice that Bear Butte is central and indispensable, (Jt. App. p.

188) and that "silence and solitude are essential in their mind to accomplish what they wish to accomplish" (Jt. App. p. 202). If South Dakota develops Bear Butte as a tourist attraction it can no longer be effectively used for the religious practices to which it has been dedicated from time immemorial.

Although the court below found "centrality" in this case it cited as precedent for its ruling such cases as Hopi and Sequoyah in which centrality was not found. E.g., 620 F.2d at 1163-64. Because the Hopi and Sequoyah cases also involved denial of physical access to sites, the court simply applied their rules as an applicable standard for this case. But here the state's construction and tourism activities interfere with "an essential part of [Petitioners'] religious belief and

and practice." Yoder, 406 U.S. at 219. This centrality of Bear Butte to Petitioners' religions, for the very reasons stated by the Sixth Circuit in Sequoyah, demand the different result here of protection against the burdens imposed by South Dakota.

Any construction at Bear Butte burdens Petitioners' religious expressions because it violates the natural topography, diminishes the power of Sacred Mountain and causes ritual failures.

> In order for the Butte to hold its sacred powers, it must remain in its natural state as it was created in the beginning. The power of the Butte is diminished each time a permanent man-made structure or alteration is made.

Affidavit of Larry Red Shirt, Jt. App. p. 40. Such desecration precludes use of the land for its traditional spiritual purposes. "Any obstruction or building of that nature in sight...is a distraction

and it just pulls our meditation and concentration away from prayer." Jt. App. pp. 109, 119.

Tourist noise, traffic and other interruptions "interferes with the Vision Quest, because it interferes with communication with the spirit world; and destroys the strength of the ceremony itself." Affidavit of Larry Red Shirt, Jt. App. p. 39. "it is of the utmost importance that Bear Butte may not be contaminated in any way..." (Jt. App. p. 122).

> When we go on a fast, we wish to be excluded from the world, the noise even, and that's why we fast and that's why we go there without food, without water. We want to put away those things that make our life a pressure. We want to fast; we want to suffer; we want to give back to God, the Great Spirit, something that he made of me here in the world.

Affidavit of Pete Catches, Jt. App. pp. 108-09.

But, with tourist development reaching 100,000 visitors a year at the Butte, it is now impossible to fast according to the ceremonial rules that require seclusion from the world.

Respondents' permit regulations require that Petitioners register whenever they worship overnight at the sacred mountain. The issuance of permits is a discretionary matter and there are no written guidelines (Jt. App. pp. 132-33, 176-77, 179-80)--in seeming contradiction to the court's own standards that licensing "without narrow, objective standards" in unconstitutional, 541 F. Supp. 785, 789.

If this case is measured by the "centrality" test, then the burden on Petitioners' free exercise of religion is evident; if the centrality test is not used then Petitioners religious exercise has indeed been unconstitutionally burdened by "the government's proposed land

use [which] would impair a religious practice that could not be performed at any other site." Wilson v. Block, supra, 708 F.2d at 744.

III. THE STATE HAS NO COMPELLING REASON FOR RESTRICTING PETITIONERS' RELIGIONS.

A burden on the free exercise of religion is constitutionally tolerable only if outweighed by state interests that are "compelling." "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Sherbert v. Verner, 374 U.S.398, 406 (1963) quoting from Thomas v. Collins, 323 U.S. 516, 530 (1944); See also Cantwell v. Connecticut, 310 U.S. 296 (1940). In Wisconsin v. Yoder, 406 U.S. at 215 it was said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of

religion." Even a superficial consideration of the state interest involved here, that of promoting recreational opportunity, would reveal less restrictive alternatives. That the State controls 200,000 acres of parkland indicates that recreational interests can be "otherwise served" by the state of South Dakota away from Bear Butte.

The court below went astray by failing to adequately weigh the burden on Petitioners' religions against alleged compelling interests of the state. In fact it may well be questioned whether the court below ever did enter upon this crucial step of First Amendment analysis. Where, as here, only commercial and recreational interests in tourism are counterpoised to religious freedoms, a careful and detailed analysis is required to adequately weigh the interests at stake. This the court below failed to do. See

Northwest Indian Cemetery Protective Assn. v. Peterson, 565 F. Supp. 587 (N.D.Cal. 1983) for an example of careful application of the "balancing test."

If it had made such an analysis the court would have had to compare the state's interest in tourism to other truly compelling interests which have been recognized by the Supreme Court, for example the interest in national security, Gillette v. U.S., 401 U.S. 437 (1971); or maintenance of a social security system, U.S. v. Lee, 455 U.S. 252 (1982). Since not just any colorable governmental interest may outweigh religious freedom, a closer analysis of the state's interest in tourism is required than that undertaken by the court below. Moreover, even if the state of South Dakota could advance a compelling need to satisfy interest in the unique topographical and cultural features

of the Sacred Mountain, or more generalized interests in enjoying outdoor pursuits in the Bear Butte area, means less restrictive of plaintiffs' rights could have been found to accomodate those interests. Cf. Northwest Indian Cemetery Protective Assn. v. Peterson, supra, 565 F. Supp at 596.

The court below reasoned that to halt construction at Bear Butte would force Respondents to "waive statutory power to manage and develop the state park in the public interest," 541 F. Supp. 785, 791. But park officials do not jeopardize their authority by adopting tourism development programs that do not infringe upon important First Amendment freedoms.

The court found a compelling interest in "preserving the environment and the resource from further erosion and protecting the health, safety and welfare of park visitors and in improving public

access." Id. at 794. There was no evidence that access by Petitioners to Bear Butte to practice their religious ceremonies had a significant adverse environmental effect. There was no evidence of serious erosion endangering park visitors. Increased public access, although a more specific value, is surely not compelling nor of the "highest order." Further recreational development of a few hundred acres, to which the public already had ample access, and which will only further Petitioners' religious freedoms, cannot justify Respondents' restrictions.

Precedent for the state interest asserted to support tourist desecration of the site was found by the court in the Tenth Circuit's Badoni case. There it was said that the First Amendment gives one "no right to insist that in the pursuit of their own interests others must conform their conduct to his own religious

necessities." Id. at 792, quoting from Badoni v. Higginson, 638 F.2d at 179 quoting from Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2nd Cir. 1953) (L. Hand, J.).

But the court missed the point. Petitioners did not claim that environmental protection interfered with religious exercise but that the continued development of a tourist industry is not sufficiently compelling to allow government interference with religious ceremony.

In 1982 the park established permit registration so that visitors could be notified of emergencies arising outside the park. This service to visitors plays no role integral to park management, but the court refused to compromise even the minimal state interest involved in this service.

According to the Court's balancing test, "even if the state's interest weighs

heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternate means." Id. at 791. The court in the instant case did not "searchingly examine the interests that the State seeks to promote." 406 U.S. at 221. Nor did it examine less restrictive methods of construction and tourism development.

IV. PETITIONERS' REQUESTED RELIEF WOULD NOT VIOLATE THE ESTABLISHMENT CAUSE.

The district court below suggested, as did the Tenth Circuit in Badoni, that it might violate the Establishment Clause to grant Petitioners' request for relief. 541 F. Supp. at 794. To restrict construction and tourism at the sacred mountain would not, contrary to the District Court's suggestion, provide the "means and environment" for Petitioners' religious practices. Id. at 791,

quoting from Clark v. Wolff, 347 F. Supp. 887, 890 (D. Neb. 1972), aff'd 468 F.2d 252 (8th Cir. 1972) (delivery of extraordinary amounts of milk provided the means and environment to prisoners on a religiously impelled diet). The state does not provision the rituals at Bear Butte. The mere absence of construction and tourists does not make the mountain and its ceremonies sacred. Petitioners do not ask the state to exclude tourists from Bear Butte; they only Ask that South Dakota stop construction which desecrates the mountain and promotes additional tourism, and restore the Sacred Mountain to its former ritually pure condition. For the park authorities to weigh competing interests according to First Amendment standards is not an impermissible state entanglement with religion. Cf. Northwest Indian Cemetery Protective Ass'n v. Peterson, 522 F. Supp. 951, 954

(N.D. Cal 1982) ("The government must manage its property in a manner that does not needlessly impair the ability of its citizens to exercise their religious freedom.") and 565 F. Supp. 586, 597 (N.D. Cal. 1983).

The district court raised the specter of a "government-managed religious shrine" to refuse Petitioners relief from tourist interferences. 541 F. Supp. 785, 792 quoting from Badoni v. Higginson, supra, at 179. Certain active assistance, such as all-weather roads and running water, the court permitted. But mere limitation of tourist activity, which entails no active involvement in the religion, the court found to be an entanglement. The court overlooked that it is not a religious preference to provide worshipers the same facilities for exercising freedom of speech and assembly that other groups enjoy. Widmar v. Vincent, 454

U.S. 263 (1981). To reserve sacred sites for religious use, as tennis courts are reserved for tennis and classrooms for discourse, cannot violate the Establishment Clause. The Court has allowed mere instrumental concerns to outweigh even First Amendment interests in order to exclude the public and press from prisons, military bases, and libraries and undoubtedly public exclusion from numerous other kinds of government property would be upheld. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Greer v. Spock, 424 U.S. 828, 836 (1976).

Bear Butte has been dedicated to religious worship since before the Constitution was written. When, as here, the First Amendment weighs on the side of excluding the public, certainly the State has the power, if not the obligation, to

preserve that use of the property just as it would any mere instrumental use of the property against demands of access by the public.

If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair" (citation omitted) 454 U.S. at 274-75. Extending the state's general protection for purposes of preserving Bear Butte's pre-existing sacred character would not amount to "establishing" Petitioners' religions there. Such protection would only avoid "disestablishing" the historical sacred nature of Bear Butte and thereby avoid burdening Patitioners' free exercise of their religions.

The district court did not weigh Petitioners' evidence of infringement,

although the success of religious practices is a subject peculiarly within the Petitioners' knowledge. United States v. Lee, 455 U.S. 252 (1982). The court saw the burdens on Petitioners free exercise as assistance and their removal of these burdens as excessive entanglement. But removal of burdens on free exercise is not an establishment issue where less entanglement would result. See Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980). By terminating its construction program the state's positive assistance would be curtailed and its regulation would fall on tourists not religious ceremonies.

There is ground between the constitutional prohibition on establishment of religion by the state on the one hand and the implementation of guarantees of religious freedom on the other. Action required to comply with the constitutional

safeguards of religious freedom must fall within the permitted range of state involvement. Otherwise, whenever the government undertakes to manage property on which there is a religious shrine, religious practitioners would necessarily lose their freedom of worship if action by the government manager is required to prevent interference with the sacred use of the shrine.

CONCLUSION

The courts below failed to analyze and properly weigh the interest of the State of South Dakota in developing and promoting Bear Butte as a tourist attraction against the serious encroachment this development makes on the religious worship and ritual of Petitioners. In a case from the Ninth Circuit protection was granted a religious site of far less religious significance against state interests that were more compelling than the tourism

involved in the instant case. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) appeal filed July 22, 1983 No. 83-2225 (9th Cir.). With the latter case now on appeal in the Ninth Circuit there is a potential division in the Circuits which would warrant granting the writ of certiorari in the present case in order to resolve the inconsistency between these cases.

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